

A Brief Analysis of the Status of a Transgender Beneficiary for Purposes of an Islamic Will within the South African Context

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SHORT BIO

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ABSTRACT

A Muslim within the South African context can ensure that his or her compulsory estate devolves in terms of the Islamic law of compulsory succession by virtue of executing a will, that includes a clause to this degree. This article looks at a fictitious scenario where a testator (X) executes an Islamic will and leaves behind a son (Y) and a transgender son (Z) (whose birth-assigned sex was female and identifies as male) as his only relatives. This article looks at the right of Z to inherit in terms of the Islamic will.

KEYWORDS

inheritance, Islamic law, South African Law, Constitutional Law, Transgender

Introduction

A Muslim within the South African context is able to ensure that his or her compulsory estate (estate after all liability claims and testate succession claims have been deducted) devolves in terms of the Islamic law of compulsory succession by virtue of executing a will which includes a clause stating this.¹

¹ The claims against a deceased estate in terms of Islamic law are (in order of priority) liability claims, testate succession claims, and compulsory succession claims. Liability claims are deducted from the gross estate (estate prior to any deductions). Testate succession claims are deducted from the net estate (estate after all liability claims have been deducted). Compulsory succession claims are deducted from the compulsory estate (estate after all liability claims and testate succession claims have been deducted). It should be noted that there will always be a compulsory estate in terms of Islamic law (in the event where the liability claims are not equal or more than the gross estate) as the testate succession claims are limited to a maximum of one third of the net estate. The remainder of the net estate (compulsory estate) would then devolve in terms of the Islamic law of compulsory succession, as deemed in the primary sources of Islamic law. Liability

This article looks at a fictitious scenario where a testator (X) executes an Islamic will on 04 October 2021 and leaves behind a son (Y) and a transgender son (Z) (whose birth-assigned sex was female and identifies as male) as his only relatives. It should be noted that Z has undergone sex reassignment surgery and has changed his gender identity from 'female' to 'male' at the Department of Home Affairs.² The testator (X) did not approve of the surgery and deemed it to be contrary to Islamic law. The testator (X) died on 04 October 2021 due to a COVID 19 related illness. In the Islamic law of compulsory succession, a son inherits double the share of a daughter.³ The share of inheritance that Z is entitled to is, thus, dependent on whether Islamic law regards Z as a son or as a daughter for the purposes of inheriting from X. This article looks at the position of Z in terms of the above fictitious scenario. The rights of transgender persons within the South African context are looked at by way of introduction. The status of a transgender person in terms of Islamic law is then examined. Potential challenges that could be made by a transgender beneficiary in the situation of Z with regard to an Islamic will are considered. The article concludes with findings and a recommendation.

The status of a transgender persons within the South African context

Transgender is an umbrella term to describe people whose gender expression or gender identity differs from the sex or gender assigned at

claims are governed by the Islamic law of liabilities, testate succession claims are governed by the Islamic law of testate succession, and compulsory succession claims are governed by the Islamic law of compulsory succession. See Muneer Abduroof and Najma Moosa, "Islamic law Mode of Estate Distribution in South Africa," *International Survey of Family Law* (2016): 457 – 480, for a further discussion on the claims against a deceased estate in terms of Islamic law.

² In this article, Z will be referred to as male, as this is the legal position within the South African context, even though the status might differ in terms of Islamic law.

³ See Muhammad Muhsin Khan and Muhammad Taqi-ud-Din al-Hilali, *The Noble Qur'an - English Translation of the Meanings and Commentary* (Madinah K.S.A: King Fahd Complex for the Printing of the Holy Quran) 1404H, 4:11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females".

birth.⁴ The umbrella term is used to describe a wide range of identities and experiences – including transsexuals, people who transition from female to male, people who transition from male to female, transvestites, cross-dressers, two-spirit individuals, queer, and many more.⁵

A transman is a “transgender man or female-to-male (FTM) who is assigned female at birth, but his gender identity is male”⁶. Z, in the scenario looked at in this article, could be referred to as a transman due to him having been assigned female biological characteristics at birth. However, a transgender person, within the South African context, may apply to have his or her gender identity altered in the birth register according to the Alteration of Sex Description and Sex Status Act.⁷

Section 2(1) of the Act states that,

[a]ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.⁸

It is interesting to note that section 2(1) does not require that the applicant undergo gender reassignment surgery. For the purpose of the Act, undergoing hormonal treatment is sufficient.

⁴ Note that a transgender person (as is discussed in this article) is different to a person who is intersexed (*khuntha*). See Salih Bin Abd Allah Fawzan, *Al Tahqeeqaat Al Mardiyyah Fee Al Mabaahith Al Fardiyyah* (Al-Ma'aarif, Riyadh, 1999), 4: 207-218 for a further discussion on this issue.

⁵ See Southern Africa Litigation Centre, *Laws and Policies Affecting Transgender Persons in Southern Africa* (Johannesburg: Southern African Litigation Centre, 2016): viii. <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>.

⁶ See Southern Africa Litigation Centre, *Laws and Policies*, viii.

⁷ Alteration of Sex Description and Sex Status Act 49, 2003.

⁸ See Alteration of Sex Description and Sex Status Act 49, 2003, sec. 2(1).

Section 3 of the Alteration of Sex Description and Sex Status Act provides that:

(2) A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration. (3) Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.⁹

The rights of transgendered persons in this regard within the South African context are further investigated in Part IV of this article.

The status of a transgender person in terms of Islamic law

There is no consensus within the Islamic law jurisprudence concerning whether or not a transgender person is allowed to change their sex via sex reassignment surgery. Al Qur'an 4, 118 and 119 state that,

Allah cursed him. And he [Shaitan (Satan)] said: 'I will take an appointed portion of your slaves; Verily, I will mislead them, and surely, I will arouse in them false desires; and certainly, I will order them to slit the ears of cattle, and indeed I will order them to **change the nature created by Allah**. And whoever takes Shaitan (Satan) as a Wali (protector or helper) instead of Allah, has surely suffered a manifest loss'. (emphasis my own)¹⁰

⁹ See Alteration of Sex Description and Sex Status Act 49, 2003, sec. 2(A).

¹⁰ See Khan and Hilali, *The Noble Qur'an*, 4:118 -119. See also Serena Tolino, "Transgenderism, Transsexuality and Sex - Reassignment Surgery in Contemporary Sunni Fatwas," *Journal of Arabic and Islamic Studies* 17 (2017): 229 – 230, where it states that "[t]he majority of Quranic exegetes interpreted the verses [4:118 -119 above] on 'changing the creation of God' as a reference to God's religion, considering that God created all people as naturally inclined to the correct religion. However, others have interpreted these verses as referring to an alteration in the physical appearance of human beings and animals. In this sense, these verses are also relevant for SRS [Sex – Reassignment Surgery], because it would be considered a change in what God created".

It could be argued that sex reassignment surgery falls within the category of wanting to change the nature created by Allah (God Almighty) and that a person who wants the change the nature in which he or she was created is being misled by Shaitan (Satan).

In 1988, a fatwa was issued by the Grand Muftee of Egypt, Sheikh Mohammed Sayyid Tantawi, concerning the status of a person who has undergone sex reassignment surgery. The fatwa was based on an Al-Azhar University medical student (Sayyid) who sought treatment for depression from a psychologist. A brief background to the situation that Sayyid found himself in will now be looked at.¹¹

Sayyid was diagnosed with “psychological hermaphroditism” as the cause of his depression. Sayyid was referred by the psychologist to a surgeon for sex reassignment surgery. The surgeon requested the opinion of a second psychologist, who confirmed the diagnosis. Sayyid was initially treated with female hormones and was later operated on in Cairo in 1988. Sayyid's penis was removed and replaced with a urinal orifice and artificial vagina. He then adopted the name ‘Sally’. Sally applied for admission to the women’s section of the Faculty of Medicine at Al-Azhar. The request was rejected by a Special Committee that was set up by Al-Azhar University to examine the case. The Doctors’ Syndicate, which was at that time a professional body dominated

¹¹ “In the early 1980s, a young man named Sayyid Abd Allah was studying at the medical faculty of al-Azhar. During his course, Sayyid, while claiming a gender ambiguity problem, contacted a psychologist and acknowledged that he was suffering from extreme depression. After examination, the psychologist found that he was suffering from ‘psychological hermaphroditism’ (al-khunutha alnafsiya). Therefore, the psychologist ‘treated him for three years, making all possible effort to restore male sexual identity to him, but eventually . . . [the psychologist] had to give up. She explained the failure as inevitable in cases like this where treatment is begun after puberty’ (Skovgaard-Petersen, 1995). After that, the psychologist proposed that Sayyid undergo sex-reassignment surgery. Sayyid went to a surgeon, but he referred Sayyid to a second psychologist. The second psychologist eventually concurred that surgery was the only way for Sayyid. Finally, he underwent a sex-reassignment operation in the late 1980s. Soon after Sayyid recovered, he took the name Sally (a female name) and still lives in Egypt”. (Mehrddad Alipour, “Islamic Shari’a law, Neotraditionalist Muslim scholars and Transgender Sex Reassignment Surgery: A Case Study of Ayatollah Khomeini’s and Sheikh al-Tantawi’s Fatwas,” *International Journal of Transgenderism* 18, no.1 (2017): 93–94)

by conservative forces, also examined the case and came to the conclusion that the surgeon, the anesthetist, and the psychologists who approved the surgery had committed a medical error, having operated on Sayyid without there being a disorder and damaging him. It was at this point that the Doctor's Syndicate requested a Fatwaa from the Grand Muftee of Egypt.¹²

Sheikh Mohammed Sayyid Tantawi stated in his Fatwaa that if reliable doctors believe that there are innate causes in the body, then sex reassignment surgery would be allowed. However, he further stated that sex reassignment surgery would not be allowed if the reason is solely based on the desire to change sex.¹³ However, the fatwa did not answer the question as to whether a diagnosis of "psychological hermaphroditism" was enough to allow for the surgery to be done in terms of Islamic law. It is also not certain as to what "innate causes in the body" entails. For purposes of the analysis, it is assumed that Z does not meet the requirement of the Fatwaa, but rather that the surgery was done solely based on his desire to change his sex, which is not allowed in Islamic law.¹⁴

Potential challenges by a transgender beneficiary in light of an Islamic will

An Islamic will within the South African context can be drawn up in two ways. First, a testator or testatrix states what proportions of his or her compulsory estate should be distributed.¹⁵ An example of this would be where a testator states in his will that he bequeaths a third of his compulsory estate in favor of his daughter and two thirds of his compulsory estate to his son.¹⁶ Second,

¹² Alipour, "Islamic Shari'a law," 93–94.

¹³ Alipour, "Islamic Shari'a law," 96–97.

¹⁴ See footnote 11.

¹⁵ See Muneer Abduroaf, "Limitations on the Freedom of Testation [Part 2 of 2]," *Without Prejudice* 20, no. 5 (2020): 47–48. www.withoutprejudice.co.za/free/article/6977/view (accessed 19 October 2021) and Muneer Abduroaf, "Limitations on the Freedom of Testation [Part 1 of 2]," *Without Prejudice* 20, no. 4 (2020a): 25–26. www.withoutprejudice.co.za/free/article/6926/view (accessed 19 October 2021) for a discussion on freedom of testation and its limitations within the South African context.

¹⁶ This would be in line with the Islamic law requirements. See Khan and Hilali, *The Noble Qur'an*, 4:11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females". It could be argued that this unequal distribution of shares unfairly discriminates against females. A further

a testator or testatrix states in their will that their compulsory estate must devolve in terms of the Islamic law of compulsory succession and that an Islamic Distribution Certificate issued by a recognized Islamic institution stating who their lawful beneficiaries are (and the proportions that they are entitled to in terms of Islamic law) at the time of his or her death would be binding upon the executor of his compulsory estate.¹⁷ This article looks at how the compulsory estate would devolved based on the Islamic Distribution certificate as stated above, as this would be where complications regarding transgender persons would emerge.

The Islamic law of compulsory succession requires that Y should inherit two thirds of the compulsory estate while Z inherits a third.¹⁸ This would be on the basis that sex reassignment surgery is not allowed in terms of Islamic law as discussed in Part III. The issue with regard to the position of Z within the South African context, however, is complex. The Islamic institution would generally issue an Islamic Distribution Certificate based on documents placed before it.¹⁹ The identity document of Z would state male due to the

discussion on this issue is beyond the scope of this article. For a further discussion on this issue, see Muneer Abduroaf, "A Constitutional Analysis of an Islamic Will within the South African Context," *De Jure Law Journal* 52, no.2 (2019): 257–266. <http://dx.doi.org/10.17159/2225-7160/2019/v52a16>, for a discussion on the constitutionality of the unequal distribution of shares based on sex, in terms of an Islamic will. See also Muneer Abduroaf, "An Analysis of the Rationale Behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession," *De Jure Law Journal* 53 (2020b): 115 –122. <http://dx.doi.org/10.17159/2225-7160/2020/v53a8>, where the rationale behind the distribution of shares in terms of the Islamic law of intestate succession is discussed.

¹⁷ There are a number of Islamic Institutions within South Africa that offer drafting services and issuing Islamic Distribution Certificates. An institution of note in the Western Cape that issues these Islamic Distribution Certificates is the Muslim Judicial Council (SA). See Muslim Judicial Council (SA) "Fatwa" available at <https://mjc.org.za/departments/fatwa/> (accessed 19 October 2021), where it states that "[t]he MJC's Fatwa Department consists of a full-time Administrator, a Mufti (Head of the Department), and a Fatwa Panel that consists of 7 learned scholars of Shariah. The Department is responsible for the following activities: Answering Shariah queries telephonically and via email Drafting of Wills Issuing Distribution Certificates Contact the Fatwa department on 021 684 4606 or email: fatwa@mjc.org.za."

¹⁸ See Khan and Hilali, *The Noble Qur'an*, 4:11, where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females."

¹⁹ See Muslim Judicial Council (SA) "Fatwa" available at <https://mjc.org.za/departments/fatwa/> (accessed 19 October 2021) where it states that "[a] Distribution Certificate is a document listing the heirs of a deceased and the portions

change in sex description based on the Alteration of Sex Description and Sex Status Act application. The Islamic institution would not be aware that Z has undergone sex reassignment surgery. However, it will be assumed for purposes of this article that the Islamic institution has been advised by Y (the son of X) that Z was born female.²⁰ The Islamic institution should, once verifying the claim, then issue a certificate stating that Y inherit two thirds and Z inherit one third.²¹ The certificate would be based on Islamic law, and also on the view that one child is male and the other is female. The rationale behind the unequal distribution of shares in the Islamic Distribution Certificate would be problematic within the South African context, based on the fact that the South African Constitution prohibits discrimination based on sex and/or gender.²² Z could, therefore, challenge the enforceability of the Islamic Distribution Certificate on the basis of it discriminating based on sex and also based on the fact that he is a male within the South African context.²³

It is noted that a testator or testatrix may use his or her right to freedom of testation to draft an Islamic will stating that their compulsory estate must be distributed in terms of Islamic law. However, within the South African context, that freedom of testation is not absolute.²⁴ The freedom is limited and discriminatory provisions found in wills have been challenged in a number of

each one receives according to the Islamic Laws of Inheritance. The Certificates are issued to clients and attorneys as soon as all relevant documentation is forwarded to the Fatwa Department”.

²⁰ The motivation behind Y bringing this information to the Islamic institution could be based on full disclosure before the Islamic Distribution Certificate issued. It should be noted that in the absence of the disclosure by Y regarding the sex of Z, Z would be regarded as a male for the purposes of the Islamic Distribution Certificate. This would mean that Y and Z would inherit equal shares as males based on the Islamic Distribution Certificate.

²¹ See footnote 19.

²² The reason why females (at times) inherit less favourably than males is not stated in the primary sources of Islamic law. When one analyses the Islamic law of compulsory succession, it can be seen that males do not always inherit double the share of females. There are instances where males and females inherit equal shares. There are also instances where females inherit to the exclusion of males who are present. For a detailed analysis of this issue, see Abduroaaf, “An Analysis of the Rationale”.

²³ This article is not primarily focused on the constitutionality of the Islamic will. For a detailed analysis on such, see Abduroaaf, “A Constitutional Analysis”.

²⁴ See Abduroaaf, “Limitations”. Part 1 and 2 for a discussion on freedom of testation and its limitations within the South African context.

court cases based on constitutional principles as well as public policy.²⁵ Nevertheless, there has been no court case to date where a discriminatory provision in an Islamic will has been challenged.²⁶

Section 9(4) of the Constitution of South Africa of 1996 states that,

[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) [race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth . . .] National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.²⁷

This section expressly prohibits persons from unfairly discriminating based on sex or gender.

Sex and gender are listed grounds in terms of section 9(3) of the 1996 Constitution of South Africa and discrimination on these grounds is, thus, deemed unfair unless it is established to be fair.²⁸ The fairness of this type of discrimination would depend on a number of factors, including the right of X to draft an Islamic will based on his religious beliefs that is also constitutionally guaranteed. Section 15 of the Constitution states that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion”. Arguably, X drafted his will based on his religious freedom to do so. An argument would have to be made based on the provisions provided in section 36 of the Constitution that governs the limitation of rights. A further

²⁵ See Abduroaf, “Limitations”.

²⁶ See Abduroaf, “Limitations”.

²⁷ See Constitution of South Africa, 1996, sec. 9(4).

²⁸ The fact that section 3 of the Alteration of Sex Description and Sex Status Act provides that “(2)A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration” would be problematic, as the rulings of Islamic law and South African law are not consistent.

discussion of this issue is beyond the scope of this article and the constitutional challenge in the final analysis is left to the courts to decide.²⁹ Notably, X's will would have been quite different if he drafted a will stating that Y should inherit two thirds and Z should inherit one third. This type of 'will' does not mention the rationale behind the discrimination and a constitutional challenge based on unfair discrimination would be much harder to prove in this regard.³⁰ The rationale behind the discrimination could, for example, be based upon a greater love for one child over the other. This would not be a listed ground in terms of section 9(3) and would, thus, not automatically be deemed unfair discrimination. There is also nothing in Islamic law that prevents X from stating in his will that Y and Z should inherit equal shares of the compulsory estate on the condition that both Y and Z consent (consent principle) to this distribution after X has died. The excess 1/6 that would be inherited by Y would be deemed a conditional bequest subject to the consent principle.³¹ If Y and Z do not consent, then the compulsory estate should be distributed two thirds to Y and one third to Z.

Conclusion

The above discussion has shown the various nuances regarding the status of a transman (Z) within the South African context for purposes of inheriting in terms of Islamic law. The findings have shown that the situation of the transman is quite complex as Islamic law and South African law are different. The constitutionality of an Islamic will that discriminates against a transman is further complicated as the testator makes use of inter alia the right to freedom of testation and the right to freedom of religion to ensure that his compulsory estate is distributed in terms of Islamic law. The transman, however, could inter alia make use of the right not be discriminated against to challenge an Islamic will. The outcome of such a challenge is in the final analysis left up to the South African courts to decide. If a testator or testatrix

²⁹ See Abduroaf, "A Constitutional Analysis" for a discussion on the constitutionality of an Islamic will within the South African context.

³⁰ This is due to the fact that section 9 of the Constitution of South Africa, 1996 deems certain grounds for discrimination to be regarded as automatically unfair, unless it is established to be fair.

³¹ The consent principle requires that the inheriting intestate beneficiaries must consent to the bequest. It should be noted that the consent must be given after the testator has died. See Abduroaf, "The Impact of South African Law,"²⁷ for further discussion.

wishes to ensure that his or her compulsory estate is distributed in terms of Islamic law, he or she should draft a will stating the fractions that each beneficiary inherits (in terms of Islamic law) without stating the rationale behind the distribution. There would then be no basis to challenge the allocation of shares in terms of the Islamic will based on constitutional principles.

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